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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1965

No. 1189

MARY L. ABBORENO, individually, and LENA R. McNAMARA, Administratrix of the Estate of Frank Abboreno, Deceased,

Petitioners,

VS.

THE HONORABLE RICHARD B. AUSTIN, United States District Judge of the United States District Court for the Northern District of Illinois,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Mary L. Abboreno, individually, and Lena R. McNamara, administratrix of the estate of Frank Abboreno, deceased, pray that the court will issue a writ of certiorari to the United States Court of Appeals for the

Seventh Circuit to review a judgment of that court dated August 30, 1965, discharging a rule to show cause against the respondent, the Honorable Richard B. Austin, United States District Judge of the United States District Court for the Northern District of Illinois, to show cause why he should not be required to finalize a non-final judgment of dismissal in action 61 C 542, and to finalize a non-final order striking the original complaint, and denying and dismissing the petition for a writ of mandamus, on the sole ground that petitioners had previously taken an appeal from said judgment and order which had been dismissed for want of prosecution, after the Court of Appeals had denied their motion for a determination whether the judgment and order appealed from were final and appealable, on the sole ground that to decide the question would be to render an advisory opinion; and to review an order of the Court of Appeals entered January 21, 1966, denying petitioners' motion filed September 10, 1965, to vacate its order of August 30, 1965.

OPINIONS BELOW.

Neither the district court nor the court of appeals wrote an opinion. The orders germane to this petition are set out in the Appendix.

JURISDICTION.

The jurisdiction of this court is based on Section 1254(1), Title 28, U.S.C. and Section 1254(1), Title 28, U.S.C.A.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED.

Fifth Amendment.

"No person shall • • • be deprived of life, liberty, or property without due process of law."

RULES INVOLVED.

Federal Rule Of Civil Procedure Involved.

Rule 54(2) Judgment Upon Multiple Claims Or Involving Multiple Parties.

"Where more than one claim for relief is presented, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. As amended Dec. 27, 1946, eff March 19, 1948; Apr. 17, 1961, eff July 19, 1961."

Court of Appeals Rule Involved.

Rule 25 Rehearing.

"(a) *Procedure.* Any party desiring a rehearing may, within 15 days after entry of judgment, file 30 copies of a petition for rehearing, three copies of which shall be served forthwith by the clerk upon the opposing party, who, within 10 days after such service, may file 30 copies of an answer thereto, 3 of which shall be served on the opposing party. The petition shall be determined without oral argument unless otherwise ordered."

QUESTIONS PRESENTED.

1.

Whether a defendant, in an action involving multiple parties, who has neither been served with summons nor filed an appearance, is a party to the action under Rule 54(b) of the Federal Rules of Civil Procedure, making it necessary for the court in entering a judgment of dismissal of the complaint against the other defendants, to make an express determination that there is no just reason for delay, and an express direction for entry of judgment, in order that said judgment of dismissal will be final and appealable.

2.

Whether under such circumstances an appeal from the order dismissing the complaint not making the express determination and direction required by Rule 54(b), dismissed for want of prosecution after the Court of Appeals had denied a motion by them to determine whether the order appealed from was final and appealable on the sole ground that to do so would be to render an advisory opinion, and they had refused to proceed further with their appeal convinced that it was not taken from a final and appealable judgment, was a nullity.

3.

Whether respondent in refusing to make the order of May 18, 1962, final and appealable, and in now insisting in his answer to the petition for writ of mandamus that it is final and appealable after originally agreeing that it was not, and the United States Court of Appeals in re-

fusing to determine whether that order is final and appealable on an appeal from said order on the sole ground that to do so would be to render an advisory opinion, and in dismissing the appeal for want of prosecution without making that determination, and in orally instructing the Clerk to strike the filing stamp off a motion to vacate the order of dismissal filed within the term on the ground it was not filed within the time in which a petition for rehearing must be filed, and returning it without acting on it, and in denying and dismissing a petition for writ of mandamus to require the respondent to finalize the order of May 18, 1962, to enable the case to be reviewed as a unit, on the sole ground that the previous appeal had been dismissed for want of prosecution, without, unless by inference, determining whether the order of May 18, 1962, is final and appealable, both courts have so far departed from the accepted and usual course of judicial proceedings, and the United States Court of Appeals has so far sanctioned such a departure from the accepted and usual course of judicial proceedings by respondent, as to call for an exercise of this court's power of supervision.

STATEMENT OF THE CASE.

The Mandamus Proceeding (Court of Appeals Case No. 15,132)

On April 23rd, 1965, petitioners Mary L. Abboreno, individually, and Lena R. McNamara, administratrix of the estate of Frank Abboreno, deceased, filed a petition for a writ of mandamus in the United States Court of Appeals for the Seventh Circuit against the Hon. Richard B. Austin, United States District Judge, to require the respondent Judge to finalize a non-final judgment of dismissal of the original complaint in Civil Action No. 61 C 542, and a non-final order striking the original complaint, dated May 18, 1962, to enable the Court of Appeals to review the entire case at one time in conjunction with an appeal from a final judgment of dismissal of a supplemental complaint now pending in the Court of Appeals as Case No. 15,073, rather than being plagued with piecemeal appeals. The petition for a writ of mandamus was assigned Court of Appeals Case No. 15,132. The Court of Appeals issued a rule to show cause, and thereafter, on August 30, 1965, that Court, acting through Circuit Judges Duffy and Schnackenberg, entered an order discharging the rule to show cause and denying and dismissing the petition for a writ of mandamus on the *sole* ground that

> "It appearing from the records of this Court, petitioners have heretofore appealed to this Court from an order dismissing the action in No. 61 C 542 as to the defendants Cleveland Wrecking Company of Cincinnati and Mitchell Braver and John A. Gorkos, dba Berry Homes, docketed in this Court as Case

No. 13834, and said appeal having been dismissed on December 4, 1963 by this Court for want of prosecution." (App. 5a-6a).

On September 10, 1965, petitioners filed a motion to vacate the order of August 30, 1965, on the ground that "the order appealed from in Case No. 13834 was not a final and appealable order for want of a direction for entry of judgment and the special finding required by Rule 54(a) of the Federal Rules of Civil Procedure," stating that the portion of that order quoted above "is factually true if, but only if, the order appealed from was a final and appealable order" and that "Case No. 13834 decided nothing unless the order appealed from is a final and appealable order", and raising constitutional objections to the action taken by the Court.

On September 27, 1965, petitioners filed a motion for leave to file an amendment to their motion of September 10, 1965, and for leave to file a reply to respondent's answer to their motion to vacate, copies of which were attached to the motion. On January 31, 1966, the Court of Appeals, acting through Circuit Judge Duffy, denied their motion of September 10, 1965, and their motion of September 27, 1965 (App. 6a-7a).

Appeal Pending In The Court Of Appeals As Case No. 15,073

On March 2, 1966, the Court of Appeals, acting through Circuit Judge Duffy, authorized and directed the Clerk of that Court to certify and transmit to this Court the record in Court of Appeals Case No. 15,073, for use by this Court in considering this petition. He has done so. It is an appeal by Respondent from a final judgment entered on November 30, 1964 (App. 4a), as to certain de-

fendants to a supplemental complaint in Civil Action 61 C 542. It is entitled:

> "Mary L. Abboreno, individually, and Lena R. McNamara, Administratrix of the Estate of Frank Abboreno, deceased, Plaintiffs-Appellants, vs. Hubert E. Hartsman; Cleveland Wrecking Company of Cincinnati, a corporation; Mitchell Braver and John A. Gorkos, individually and as co-partners, doing business as Berry Homes; and Arthur Dumas; Defendants; and Exchange National Bank, a national banking corporation, as Trustee of Trust No. 3307, Defendant-Appellee; and Berry Central, Inc., an Illinois corporation, Defendant; and Chester J. Swienton and Harriet M. Swienton, his wife, and Norwood Park Savings and Loan Association, an Illinois corporation, Defendants-Appellees."

Hubert E. Hartsman, Arthur Dumas, and Berry Central, Inc., have not been served with summons or appeared voluntarily, although summons has been issued and returned "Not Found", and no effort is being made to have them made appellees because the courts below have no jurisdiction over them. Cleveland Wrecking Company and Berry Homes have been served with summons, and have filed their appearances in the District Court, and are beneficiaries of the order of May 18, 1962, in that Court. Petitioners want to make said defendants appellees in Court of Appeals Case No. 15,073.

Civil Action 61 C 542

This action is an action to quiet title to certain real estate in Chicago, Illinois in petitioners based upon a denial of constitutional rights under the Fourteenth Amendment to the Constitution of the United States, Section 1, by the Superior Court of Cook County, and by the Supreme Court of Illinois, on a bill to quiet title

filed by Hubert E. Hartsman against Frank Abboreno, and a cross-bill to quiet title filed by Frank Abboreno against Hubert E. Hartsman, said cross-bill including a claim for damages against Hubert E. Hartsman, Cleveland Wrecking Company, and Berry Homes, the parties defendant to the original complaint filed in the District Court, for trespass on the land and destruction of property. The additional defendants named in the Supplemental Complaint filed in the District Court are successors in interest to Hubert E. Hartsman. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

On March 29, 1961, Frank Abboreno, now deceased, filed this suit against Hubert E. Hartsman, Cleveland Wrecking Company, and Berry Homes (15,073, Rec. 1, pp. 4-35). On May 11, 1961, Berry Homes filed a motion to strike (15,073, Rec. 3, pp. 1-2). On June 15, 1961, Cleveland Wrecking Company filed a motion to dismiss (15,073, Rec. 1, pp. 38-39).On May 18, 1962, the Court entered an order reading: "Defts mo to dism is sustd & complt is dismd" (App. 1a) (15,073, Rec. 1, p. 40). On June 14, 1962, Abboreno moved the Court to make the order of dismissal final and appealable in regard to both Cleveland Wrecking Company and Berry Homes (15,073, Rec. 1, pp. 41-42), stating:

> "The present order of dismissal is not final by reason of the fact that the defendant Hubert E. Hartsman, has neither been served with summons nor filed his appearance so that the judgment of dismissal is not effective as to him and no appeal can be had in the absence of an express finding that there is no just reason why the judgment should not be enforced or appealed" (15,073, Rec. 1, p. 41).

The motion was denied (App. 1a) (15,073, Rec. 1, p. 43).

Court of Appeals Case No. 13,834

On June 14, 1962, Abboreno filed a Notice of Appeal (15,073, Rec. 1, p. 44). The case was docketed in the Court of Appeals as Case No. 13,834. On August 31, 1962, he filed a motion asking the Court to determine whether the order of May 18, 1962, was final and appealable (13,834, Rec., pp. 4-7), stating:

> "The question submitted for determination • • • is whether an unserved defendant who has filed no appearance by answer or otherwise is a party within the meaning of Rule 54(b) and whether the complaint against him is a claim within the meaning of Rule 54(b)" (13,834, Rec., p. 7).

It also stated:

> "Neither the appellant nor the appellee nor the District Court believe the judgment appealed from is a final and appealable judgment, and this appeal has been taken merely as a precautionary device for the purpose of protecting the rights of the plaintiff. That is why appellant is asking the court to determine the question of finality and appealability on motion rather than on printed brief" (13,834, Rec., pp. 4-5).

The appellees made no response to the motion. On September 7, 1962, the Court denied the motion on the *sole* ground that to do so would be to render an advisory opinion (App. 1a) (13,834, Rec., p. 9). Frank Abboreno died on September 26, 1962, and on November 30, 1962, Petitioners were substituted as parties plaintiff-appellant in the Court of Appeals, and the complaint amended accordingly (13,834, Rec. p. 10; 15,073, Rec. 2, p. 6). Petitioners proceeded no further with the appeal because they did not consider the order appealed from was final and appealable. On December 4, 1963, the appeal was dismissed

for want of prosecution (App. 2a) (15,073, Rec. 2, p. 15). On December 27, 1963, the mandate of the Court of Appeals was issued and filed in the District Court in Case No. 61 C 542 (15,073, Rec. 2, p. 15).

On December 30, 1963, petitioners filed a motion in the Court of Appeals to vacate the order dismissing the appeal for want of prosecution and for determination of question whether order appealed from is a final and appealable order (15,132, Rec., pp. 38-40) on the ground that:

> "This Court has deprived the plaintiffs-appellants of their right to a ruling whether the order appealed from is a final and appealable order, and of their right to proceed to judgment on that point and, perhaps, of their property, should it later determine that the order appealed from is a final and appealable order, without due process of law, in violation of their federal constitutional right not to be deprived of their procedural rights and of their property without due process of law under the 5th Amendment to the Constitution of the United States, by its order refusing to decide that question on the erroneous ground that to do so would be to render an advisory opinion, which it could not possibly be because it would be binding on the parties to this appeal, and by its order dismissing their appeal for want of prosecution when it was impossible to proceed further without a determination of that question": and
>
> "This Court has deprived the plaintiff-appellants of their federal constitutional right to due process of law, in violation of their federal rights under the 5th Amendment to the Constitution of the United States, in dismissing their appeal for want of prosecution, when the failure to proceed is due to its own failure to perform its judicial function and not to

their failure to file briefs on a point of law that the Court has stated it will not decide because to do so would be to render an advisory opinion" (15,132, Rec., pp. 38-40).

On January 2, 1964, the Clerk of that Court returned the motion with the file stamp obliterated on page 1 (15,132, Rec., p. 38) and on the back of the cover (15,132, Rec., p. 42) but still appearing on the face of the Notice (15,132, p. 41), with a covering letter dated January 2, 1964, reading in material part:

> "There was received in our office on December 30, 1963, your 'Motion * * *' Our rules provide that petitions for rehearing must be filed within fifteen days after final order. * * * the mandate of our Court issued to the District Court on December 27, 1963 * * *. No motions can be filed subsequent to the issuance of the mandate. Nevertheless, I did take your motion, though not filed, to the Court, and was advised by the Court that it should not be filed and should be returned to you. I am therefore returning this motion * * *" (App. 3a) (15,132, Rec., p. 43).

Supplemental Proceedings In Civil Action 61 C 542

Meanwhile, on December 6, 1963, petitioners moved the District Court for leave to file a Supplemental Complaint (15,073, Rec. 2, p. 7). Respondent entered an order reading: "Enter order", but modified the Brief Statement of the Motion by adding the words "adding additional parties defendant," and orally told their attorney that it would not permit him to file a Supplemental Complaint naming the original defendants who had been served with summons and whose motions had been passed on by the Court (15,073, Rec. 2, p. 10, pp. 16-19).

On December 31, 1963, petitioners filed a Motion To Vacate Order Denying Leave To File Supplemental Complaint Instanter As A Matter Of Constitutional Right (15,073, Rec. 2, pp. 18-19) and the motion was denied (15,073, Rec. 2, p. 21). On January 6, 1964, petitioners filed a Supplemental Complaint, after first deleting the name of Cleveland Wrecking Company as a defendant, the name in the introductory paragraph and prayer for relief being lined out in red ink (15,073, Rec. 2, pp. 22-29, p. 22, p. 29). In addition to naming all the original defendants except Cleveland Wrecking Company, it named Exchange National Bank, Berry Central, Chester J. Swienton and Harriet N. Swienton, and Norwood Park Savings and Loan Association, as parties defendant (15,073, Rec. 2, p. 22).

All the new defendants except Berry Central filed a motion to dismiss the Supplemental Complaint on February 20, 1964 (15,073, Rec. 2, pp. 32-34), and on November 30, 1964, their motion to dismiss was granted and a final and appealable order and judgment of dismissal entered as to them (App. 4a) (15,073, Rec. 2, pp. 43-44, and 45). On December 30, 1964, petitioners filed a Notice of Appeal from that final order and judgment (15,073, Rec. 2, pp. 46-47). It was filed in the Court of Appeals as Case No. 15,073.

On January 13, 1965, petitioners filed a motion requesting the Court to make the order of May 18, 1962, final and appealable, by making the finding required by Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay in entry of a final judgment as to Cleveland Wrecking Company of Cincinnati and Berry Homes, in order that this case will not be reviewed

piecemeal, and for leave to amend the Notice of Appeal to include that order (15,073, Rec. 3, p. 3). On January 13, 1965, the motion was argued and denied (App. 5a) (15,073, Rec. 3, 4). On February 2, 1965, on the Court's own motion, the cause was dismissed as to defendant Arthur Dumas for want of prosecution (15,073, Rec. 3, p. 5), but the Court did not find there is no just reason for delay in the entry of a final judgment as to him.

On April 23, 1965, petitioners filed their petitions for a writ of mandamus in the Court of Appeals as Case No. 15,132.

ARGUMENT.

Reasons Why This Petition Should Be Granted.

Rule 19(b) of the Rules of this Court indicates the character of the reasons which will be considered by this Court in granting certiorari to review a judgment of a United States Court of Appeals. Five reasons are stated, and three of them are present in this case.

The first reason is that the Court of Appeals has rendered a decision in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Lohr* v. *United States,* 1959, 264 F. 2d 619, 620-1, on the issue of parties, and with the decision of the Court of Appeals for the Ninth Circuit in *Reynolds* v. *Wade,* 1957, 241 F. 2d 208, 209, on the issue of the need for a direction for entry of judgment.

The second reason is that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The third reason is that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by Respondent in the District Court, as to call for an exercise of this Court's power of supervision.

Further, the Court of Appeals has rendered a decision in conflict with its own decision in *Hardy* v. *Bankers Life & Casualty Co.,* 1955, 222 F. 2d 827, 828.

I.

The Order Of May 18, 1962, Is Not A Final And Appealable Order For Want Of The Express Finding And Direction Required By Rule 54(b) Of The Federal Rules Of Civil Procedure. Petitioners' Purported Appeal From That Order Was A Nullity.

Rule 54, in its present form, effective July 19, 1961, modified subdivision (b) to make it cover situations "when multiple parties are involved" and to authorize entry of judgment as to fewer than all the "parties" only on basis of an express determination that there is no just reason for delay and an express directive for the entry of judgment. 1961 Federal Rules of Procedure, p. 93.

The Respondent knew this Rule is applicable to this case because in his decree of November 30, 1964, he found "that there is no just reason for delay in the entry of a final judgment or decree as to said defendants," and he dismissed both the supplemental complaint and the cause (App. 4a). His minute order of that date expressly directed entry of judgment (App. 4a).

In *Hardy* v. *Bankers Life & Casualty Co.,* 1955, 222 F. 2d 827, 828, the Court of Appeals for the Seventh Circuit itself held that Rule 54(b) could not make final and appealable a judgment rendered in favor of less than all the parties defendant in a case founded upon a single claim and that:

> "This rule also applies to parties defendant who have not been served. They are still parties to the law suit and service may still be had on some or all of them."

In *Lohr* v. *United States,* 1959, 264 F. 2d 619, 620-1, the Court of Appeals for the Fifth Circuit also held that:

"This rule also applies to parties defendant who have not been served. They are still parties to the law suit and service may still be had on some of them. *Hardy* v. *Bankers Life & Casualty Co.*, 222 F. 2d 827, 828."

In *Reynolds* v. *Wade,* 1957, 241 F. 2d 208, 209, the Court of Appeals for the Ninth Circuit had before it an appeal from an order of dismissal in which the final sentence of the opinion of the district court recited that the motion for dismissal was granted and that the case was dismissed, and the purported judgment subsequently signed and filed by the trial judge had decreed that the complaint be dismissed and that the defendants recover attorney fees. The court said:

"Dismissal of a complaint, we have often held, does not constitute a final judgment. The court must take the next step and dismiss the action. * * * The docket entries have arrived.

"The two pertinent entries nakedly say:

'Mar 26 Opinion filed.

'April 23 Judgment filed and entered.'

"We must now hold that there is no judgment whatsoever yet."

In this case, the Cleveland Wrecking Company of Cincinnati filed a motion in the District Court entitled "Motion To Dismiss Action." An examination of the body of the motion shows that it is not a motion to dismiss the action. Rather, it is a motion "to dismiss the complaint." The order of May 18, 1962, reads: "Deft's mo to dism is sustd & complt is dismed" (App. 1a). It is quite evident that the order sustained the defendant's motion to dismiss the complaint but did not dismiss the action or direct a judgment of dismissal of the action to be entered as required by Rule 54(b).

(Petitioners' counsel missed this point in the motion that he filed in Court of Appeals Case 13,834, because in that motion (13,834, Rec. p. 6), in referring to his first motion in the District Court to have the order of May 18, 1962, made final and appealable, he said: "The express direction for entry of judgment having already been made, it was not requested in the Motion." He was in error.)

It follows that the order of May 18, 1962, is not final and appealable and may be vacated at any time, and that the appeal from that order, which was filed in the Court of Appeals as Case No. 13,834, is a nullity.

II.

The Respondent And The Court Of Appeals Have Abused Their Discretion, Respondent In Refusing To Make The Order Of May 18, 1962, Final And Appealable, And The Court Of Appeals In Denying And Dismissing The Petition For A Writ Of Mandamus To Compel Him To Make That Order Final And Appealable.

Respondent and the Court of Appeals have abused their discretion.

Respondent's refusal to make the order of May 18, 1962, final and appealable, coupled with his failure to permit petitioners to litigate further in the District Court by reason of his refusal to permit them to file a Supplemental Complaint against Cleveland Wrecking Company of Cincinnati, and the refusal of the Court of Appeals to mandamus him to finalize the order of May 18, 1962, has brought the judicial process to a standstill, holding the case in the District Court, making its non-final determinations permanent, depriving them of their right to appellate review, making the District Court the court of

last resort, usurping the power of the Court of Appeals and of this Court, in violation of their fundamental right under the Fifth Amendment to the Constitution of the United States not to be deprived of their procedural rights and property without due process of law.

The reason given by the Court of Appeals for denying and dismissing the petition for a writ of mandamus does not warrant that action. If the order of May 18, 1962, was not final and appealable, the appeal taken from it was a nullity, even though it was dismissed for want of prosecution. It is noteworthy that the Court of Appeals did not deny and dismiss the petition for a writ of mandamus on the ground that the order of May 18, 1962, was final and appealable but solely on the ground that the purported appeal had been dismissed for want of prosecution. The action of the Court of Appeals is subject to two interpretations: 1. That the order of May 18, 1962, is final and appealable; and, 2. That petitioners forfeited their right of appellate review for that order because their purported appeal was dismissed for want of prosecution whether that order was final and appealable or not. The Court of Appeals was asked to clarify its position in the motion to vacate its order of August 30, 1965, denying and dismissing the petition for writ of mandamus. If the latter interpretation is correct, it is refusing on petition for a writ of mandamus to do what it refused to do on motion on direct appeal, i.e., to determine whether the order of May 18, 1962, is final and appealable. It is not justified in doing so. An impasse can only be prevented by this Court.

There is no possible reason other than the finality and appealability of the order of May 18, 1962, or the dismissal of the appeal for want of prosecution, that

would justify Respondent's action, or the action of the Court of Appeals, in this case.

It is the policy behind Rule 54(b) that appeals involving fewer than all parties or claims shall be the exception rather than the rule. The appeal presently pending in the Court of Appeals is justified, in view of the fact that no service of summons has been made on some defendants who have not appeared voluntarily, because it would be unfair to make the present appellees wait until these defendants have been served with summons or appear voluntarily before having the benefit of a final and appealable judgment of dismissal, it is equally unfair to petitioners to make their right of appeal against Cleveland Wrecking Company of Cincinnati and Berry Homes await such service or appearance, which may never happen.

The Motion To Strike Complaint filed on May 11, 1961, by Mitchell Braver and John A. Gorkos, individually and as co-partners, doing business as Berry Homes, was based on three grounds: (a) The complaint does not show that the plaintiff was deprived of his property without due process of law, nor does it show a denial to the plaintiff to the equal protection of the laws of the United States of America''; (b) res adjudicata; and (c) laches (15,073, Rec. 3, p. 1). The Motion Of Defendant, Cleveland Wrecking Company of Cincinnati, a corporation, * * * To Dismiss Action was based on the ground that the District Court ''does not have jurisdiction of the subject matter'' because the litigation in the State courts was ''res judicata'', etc. (15,073, Rec. 1, pp. 38-39). The Motion To Dismiss Supplemental Complaint filed February 20, 1964, by the supplemental defendants served with process, is based on

res adjudicata and lack of jurisdiction in the District Court (15,073, Rec. 2, pp. 32-33). The District Court granted each motion without specifying the ground on which its decision was based (App. 1a; 4a) (15,073, Rec. 3, p. 40; Rec. 2, pp. 43-44).

The presence of Hubert E. Hartsman, Arthur Dumas, and Berry Central, Inc., is not required to determine the matter of jurisdiction of the merits of the case against Cleveland Wrecking Company and Berry Homes because their respective liabilities, if any, are not dependent on any judgment being entered against Hubert E. Hartsman, Arthur Dumas, and Berry Central, Inc. No practical benefit can be derived from delaying finality and appealability of judgment as to Cleveland Wrecking Company and Berry Homes until Hubert E. Hartsman, Arthur Dumas, and Berry Central, Inc., have been served with summons or appear voluntarily, because the position the latter would have taken had they been served with summons or appeared voluntarily would have been, in the case of Hubert E. Hartsman, the same as that taken by Cleveland Wrecking Company and Berry Homes, and in the case of Arthur Dumas and Berry Central, Inc., the same as that taken by the other supplemental defendants-appellees in the District Court, so all possible legal questions that could be raised are now before the courts. The only difference between the position taken by Cleveland Wrecking Company and Berry Homes on the one hand and the defendants-appellees in the Court of Appeals on the other hand is that the latter litigants have raised the additional purported defense of laches. The presence of that additional purported defense is no basis for denying petitioners appellate review as far as Cleveland Wrecking Company and Berry Homes are concerned

since all the defenses raised by them will be before the Court of Appeals anyway and might as well be determined at the same time as they are determined as to the defendants to the Supplemental Complaint.

III.

Both Respondent And The Court Of Appeals Have So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

Starting with the order of the United States Court of Appeals in Case No. 13,834 entered on September 7, 1962, denying Petitioners' motion for a determination if Respondent's order of May 18, 1962, was final and appealable, on the sole ground that "what the plaintiff-appellant is really asking of this Court is an advisory opinion as to a matter now pending before it", which it could not possibly have been because it would have been binding on the parties to that appeal, and ending with the order of the Court of Appeals in Case 15,132 on August 30, 1965, denying and dismissing the petition for a writ of mandamus on the sole ground that the appeal in Case No. 13,834 had "been dismissed on December 4, 1963 by this Court for want of prosecution" when it was impossible to proceed further without a determination of the finality of the order of May 18, 1962, and the failure to proceed was due to its own failure to perform its judicial function and not for failure of Petitioners to file briefs on a point of law that that Court had stated it would not decide because to do so would be to render an advisory opinion, and with the order of that Court entered January 31, 1966, denying a motion to vacate its order of August 30, 1965, without determining whether the order of May 18, 1962, was final and appeal-

able, the Respondent and the Court of Appeals have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

We have the spectacle of a Judge of a United States District Court, refusing to make his order of dismissal final and appealable, tacitly admitting that it was not final and appealable; and then, refusing Petitioners leave to file a Supplemental Complaint bringing in new parties unless the names of the defendants named in the original complaint who had filed motions to dismiss were deleted from it, treating his order of dismissal as being final and appealable, to prevent them from continuing their litigation against those defendants in the district court, and again refusing to make it final and appealable, to prevent them from obtaining appellate review; making said order of dismissal more final and appealable than a final and appealable order could ever be because it could not be reversed; and then, defending himself against a rule to show cause why a writ of mandamus should not issue to compel him to make it final and appealable, by changing his original position that it was not final and appealable to the position that it was final and appealable, to prevent them from ever obtaining appellate review of that order, and a possible reversal of his decision.

And we have the spectacle of a United States Court of Appeals treating its Rule 25, requiring the filing of petitions for rehearing to be filed in 15 days as barring the filing of a motion to vacate an order of dismissal, filed during the term the order was entered, when the order dismissing the appeal had not passed on the merits of the case, and the Rule had no application (*Village of*

North Chicago v. *American Steel & Wire Co.*, 1906, 221 Ill. 539, 77 N.E. 104) and orally directing the Clerk to remove the filing stamps and return the motion to petitioners' attorney so they would have no record on which its action could be reviewed by this Court.

Wherefore, Petitioners pray that the petition be granted.

Respectfully submitted,

HUGH M. MATCHETT,
10 S. La Salle Street,
Chicago, Illinois 60603,
FRanklin 2-4015,
Attorney for Petitioners.

APPENDIX

District Court Minute Order of May 18, 1962 in Case No. 61 C 542 (15,073, p. 40):

Leave to plaintiff to amend complaint on face—Defendant's motion to dismiss sustained and complaint is dismissed—Austin, J.

District Court Minute Order of June 14, 1962 in Case No. 61 C 542 (15,073, p. 43):

Motion to make judgment of dismissal final argued and denied—Austin, J.

Court of Appeals Order of September 7, 1962 in Case No. 13834 (13,834, p. 9):

Plaintiff-appellant has filed a motion asking this Court to enter an order deciding whether the judgment of dismissal appealed from is a final and appealable judgment. Said motion states that neither the appellant, the appellee nor the District Court believes the judgment appealed from is a final and appealable judgment; and, it appearing that what the plaintiff-appellant is really asking of this Court is an advisory opinion as to a matter now pending before it;

It Is Ordered, that the motion of appellant for an order deciding whether the judgment of dismissal appealed from is a final and appealable judgment be and the same is hereby Denied.

(Appendix)

Court of Appeals Order of December 4, 1963 in Case No. 13834 (13,834, p. 11):

On consideration of the statement of plaintiffs-appellants filed in the office of the Clerk of this court on November 1, 1963 in response to a rule entered by this court on October 22, 1963, on plaintiffs-appellants to show cause why this appeal should not be dismissed for want of prosecution; the answer of defendant-appellee, Cleveland Wrecking Company of Cincinnati, to such statement and its motion to dismiss this cause for want of prosecution; and

It appearing to the court that the record on appeal herein was filed in this court on June 14, 1962; that plaintiffs-appellants have taken no steps in this appeal since an order substituting parties was entered herein on November 30, 1962, except to respond to said rule to show cause;

It Is Ordered, that this cause be and the same is hereby Dismissed for want of prosecution.

(Appendix)

Clerk Court of Appeals Letter of January 2, 1964 in Case No. 13834 (15,132, p. 43):

(Letterhead Of)

UNITED STATES COURT OF APPEALS

January 2, 1964

Mr. Hugh M. Matchett
Attorney at Law
29 So. LaSalle Street
Chicago 3, Illinois

Re: Mary L. Abboreno, etc., et al. v. Hubert E. Hartsman and Cleveland Wrecking Company of Cincinnati, et al.,
No. 13834

Dear Mr. Matchett:

There was received in our office on December 30, 1963, your "Motion to vacate order dismissing appeal for want of prosecution and for determination of question whether order appealed from is a final and appealable order".

Our rules provide that petitions for rehearing must be filed within fifteen days after final order. That time had, of course, expired. Also as you are probably aware, although you might not have been so aware on December 30, 1963, the mandate of our Court issued to the District Court on December 27, 1963, pursuant to our rules. No motions can be filed subsequent to the issuance of the mandate.

Nevertheless, I did take your motion, though not filed, to the Court, and was advised by the Court that it should not be filed and should be returned to you. I am therefore returning this motion and copies thereof to you with this letter.

Very truly yours,
/s/ Kenneth J. Carrick

KJC:hm
Enc.
cc—Mr. William J. Lynch
33 N. LaSalle Street
Chicago, Illinois

(Appendix)

District Court Minute Order of November 30, 1964 in Case No. 61 C 542 (15,073, p. 45):

Enter final judgment dismissing cause as to certain defendants—Austin, J.

District Court Decree Dismissing Cause As To Certain Defendants of November 30, 1964 in Case No. 61 C 542 (15,073, pp. 43-44):

This cause coming on to be heard on motion of defendants, The Exchange National Bank of Chicago, a national banking association, as Trustee under Trust Agreement dated October 1, 1962 and known as Trust No. 3307, Berry Central Inc., an Illinois corporation, Chester J. Swienton, Harriet N. Swienton, and Norwood Park Savings and Loan Association, an Illinois corporation, to dismiss the supplemental complaint, which supplemental complaint was filed herein on January 6, 1964, and the court having heard the arguments of counsel and being fully advised in the premises, the court finds:

1. That the motion of said defendants to dismiss the supplemental complaint be and the same is hereby granted and sustained.
2. That the plaintiffs, by their attorney, have elected to stand on their supplemental complaint.
3. That there is no just reason for delay in the entry of a final judgment or decree as to said defendants.

It Is Therefore Ordered, Adjudged And Decreed that the supplemental complaint and this cause be and the same is hereby dismissed as to said defendants.

Dated: November 30, 1964

Enter: s/ Richard B. Austin
Judge

(Appendix)

District Court Order of January 13, 1965 in Case No. 61 C 542 (15,073, p. 4):

Order denying motion of plaintiff to finalize order—Austin J.

Court of Appeals Order of August 30, 1965 in Case No. 15132 (15,132, p. 33):

Mary L. Abboreno, individually, and Lena R. McNamara, administratrix of the estate of Frank Abboreno, deceased, have filed a petition for a writ of mandamus against respondent Honorable Richard B. Austin, United States District Judge for the Northern District of Illinois, to require respondent to finalize an alleged non-final judgment of dismissal of the original complaint in Civil Case No. 61 C 542, and to finalize an alleged non-final order striking the original complaint.

It appearing from the records of this Court, petitioners have heretofore appealed to this Court from an order dismissing the action in No. 61 C 542 as to defendants Cleveland Wrecking Company of Cincinnati and Mitchell Braver and John A. Gorkos, dba Berry Homes, docketed in this Court as Case No. 13834, and said appeal having been dismissed on December 4, 1963 by this Court for want of prosecution;

It Is Ordered, that the rule to show cause heretofore entered be and the same is hereby Discharged.

(Appendix)

It Is Further Ordered, that the petition for a writ of mandamus be and the same is hereby denied and dismissed.

Enter: s/ Richard B. Austin
Judge

Court of Appeals Order of January 31, 1966 in Case No. 15132 (15,132, p. 48):

On April 23, 1965, a petition for a writ of mandamus against Hon. Richard B. Austin, United States District Judge, was filed in this Court to require the respondent Judge to finalize an alleged non-final judgment of dismissal in Civil Action No. 61 C 542, and to finalize an alleged non-final order striking the original complaint. This Court issued a rule to show cause, and thereafter, on August 30, 1965, this Court, acting through Circuit Judges Duffy and Schnackenberg, entered an order discharging the rule to show cause and denying and dismissing the petition for a writ of mandamus.

On September 10, 1965, Mary L. Abboreno, individually, and Lena R. McNamara, Administratrix of the Estate of Frank Abboreno, deceased, filed a motion to vacate the August 30, 1965 order of this Court. On September 27, 1965, the petitioners filed a motion for leave to file an amendment to their September 10 motion, and for

leave to file a reply brief to respondent's answer to their motion to vacate.

It Is Ordered, that the motion for leave to file an amendment to the petitioners' September 10 motion and the motion for leave to file a reply brief, be Denied.

It Is Further Ordered, that the petitioners' motion to vacate this Court's order of August 30, 1965, be Denied.

It Is Further Ordered, that a stay of mandate for thirty (30) days from the date of this order be granted in order to permit petitioners to apply to the United States Supreme Court for a writ of certiorari.

It Is Further Ordered, that the petitioners' time for filing their briefs and appendices in Case No. 15073, shall be extended until thirty (30) days after the Supreme Court of the United States has taken final action on petitioners' writ of certiorari in case No. 15132.